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IN THE

Supreme Court of the United States

October Term, 1956

No. .....

THEODORE B. RUSSELL,

Petitioner,

vs.

THE TEXAS COMPANY, a corporation, FREDERICK T. MANNING DRILLING COMPANY, a corporation, and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Petitioner, Theodore B. Russell, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on November 24, 1956. The Court of Appeals affirmed the Judgment entered by the United States District Court for the District of Montana, which was made on Respondents' motions for Summary Judgment, and decided that the mineral estate (valued by Petitioner at in excess of one million dollars) on land owned by Petitioner was vested in Respondents.

Opinions Below.

The District Court prepared no separate opinion. Its Judgments, Partial Summary Judgment entered December 4, 1953, and Final Judgment entered October 13, 1955, are contained in the record printed for use of the court below, nine additional copies of which are filed herein for the use of this Court [R. 69-73, 126-1929]. In connection with its Final Judgment, the District Court filed a Memorandum [R. 120-126] which is not relevant to this Petition for Certiorari, and filed Findings of Fact and Conclusions of Law [R. 110-120], certain of which are relevant to this Petition [R. 111-113, 118-119].

The opinion of the Court of Appeals is not yet reported, and appears as Appendix A hereto.

Jurisdiction.

The Judgment of the Court of Appeals was entered November 24, 1956 [R. 271, Appx. A, p. 18]. Petition for Rehearing was filed within time, and on January 21, 1957, the Court of Appeals denied the Petition for Rehearing (Appx. A, p. 18). Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). Order of this Court was made April 15, 1957, extending time for filing the Petition to and including May 20, 1957.

Questions Presented.

1. Whether the *Proviso* of the Joint Resolution of May 31, 1870[1] requiring, on the conditions specified, that all lands thereby granted to a railroad in aid of construction shall become subject to settlement and pre-emption at a price not exceeding $2.50 per acre, is applicable to the land here involved?

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[1]Resolution 67, Stat. at L. 378.

2. Whether, the *Proviso* of the Joint Resolution of 1870 having been determined to be applicable, a reservation of mineral rights by Respondent, Northern Pacific Railway Company,[2] in its conveyance to an actual settler constitutes such a derogation of the *Proviso* as to invalidate the mineral reservation?

The Statutes Involved.

Inasmuch as the issues presented are largely statutory, and based upon the Congressional intent, we here set out provisions having particular relevance, and set forth in Appendix B their fuller expression.

1. *The Act of July 2, 1864*[3] *incorporated Northern Pacific, authorized its construction of a railroad from Lake Superior to Puget Sound, with a branch line via the Columbia River to Portland, Oregon, conditionally granted certain public land in aid thereof, subject to prohibitions against encumbrance and with reservation of Congressional power to amend or repeal the Act.*

Section 3 of said Act of 1864 provides, in part:

> *"And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, muni-

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[2]In this Petition we will not endeavor to distinguish between Northern Pacific Railroad Company, the original corporation, and its successor, Northern Pacific Railway Company, the Respondent herein, except where such distinction appears material; we will refer to the railroad companies as "Northern Pacific" and will refer to the Respondent, The Texas Company, by its full name. Defendant, Frederick T. Manning Drilling Company, a corporation, has been dismissed from the action by stipulation of the parties [R. 109].

[3]13 U. S. Stat. at L. 365, Chap. 217.

tions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, . . ."

Section 10 of said Act provides, in part:

". . . and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States."

Section 20 of said Act provides:

"And be it further enacted, That the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

2. *The Joint Resolution of 1870 authorized Northern Pacific to issue mortgage bonds for construction, authorized change of the main line as well as a new route for the branch line, affirmed the land grant therefor, and adopted a Proviso subjecting granted lands to settlement and pre-emption and prescribing certain limitations on foreclosure remedies.*

The Resolution of 1870 provides, in part, as follows:

". . . That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid

in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, . . . also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; . . . *Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre;*[4] . . ."

Statement.

The particular parcel of land in issue is Section 23, Township 17 North, Range 53 East, M. P. M., Dawson County, Montana. Section 23 lies within twenty miles of the road and is thus characterized as "place lands" as distinguished from "lieu lands" or "indemnity lands" which Northern Pacific was entitled to select when, for reasons described in the statutes, the lands within the place or "primary" limits were unavailable to it.

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[4]The emphasis upon this part of the *Proviso* we have added, as it is the hinge upon which this cause turns. Petitioner contends that the *Proviso* applies to all lands granted to Northern Pacific and not earned at the date of adoption of the Joint Resolution of 1870; whereas, Respondents would have the *Proviso* limited in its application to the land grant made by the Joint Resolution of 1870 for the branch line authorized thereby across the Cascade Mountains to Puget Sound.

The magnitude of the Northern Pacific land grants in Montana are graphically portrayed by the plat appearing as Appendix C. The place and indemnity belts for the present states of North Dakota, Idaho, Washington and Oregon are fully analogous, and the grants for the then states of Wisconsin and Minnesota differ only in that the alternate sections of the "place lands" extend over ten miles on each side of the road, rather than the twenty miles applicable to the territories. The final adjudication of this case will likely resolve the mineral ownership of land grant parcels disposed of by Northern Pacific throughout its vast domain in cases where the disposition took place more than five years after completion of the road. Inherent in the adjudication is the fulfillment or permanent nonfulfillment of Congressional intentions as to eventual devolvement upon the public of granted lands and their values. Hence, we trace the history of Section 23, and in so doing, the history of every parcel similarly situated.

1. The Beginning of the Removal of Section 23 From Public Lands Is Found in the Act of 1864, Although the Grant Therein Failed Because of Northern Pacific's Financial Inability to Construct the Road Under the Conditions of the Act of 1864.

This first Act in the chain of title of Section 23, that of July 2, 1864, proposed the financing of the construction of a railroad through the Northwest, found by Congress to be a public necessity, by the sale of stock to the general public by a federally chartered corporation, in aid whereof Northern Pacific was granted every alternate section of

public land, not mineral, to the amount of twenty sections per mile through territories[5] and ten sections per mile through states, with certain selection rights in lieu of the grant in the event mineral character, prior disposition, or other matters prevented the operative effect of the grant (Secs. 3 and 10). Northern Pacific's entitlement to patent was conditioned upon favorable report as to each twenty-five miles of line made ready for service (Sec. 4); thus it was unable to convey its right to granted lands until such time,[6] and it was prohibited from creating any mortgage or lien without consent of Congress (Sec. 10). On its part, the Government provided that the Government's reserved alternate sections should not be sold by the Government for less than $2.50 per acre and then only under the homestead act specified in the Act of 1864 (Sec. 6). The land grant and other rights and privileges were wholly conditioned upon acceptance of the terms of the Act by Northern Pacific within two years after its passage (Sec. 12), commencement of work within two years, and completion of not less than fifty miles per year after the second year, with completion of the whole road by July 4, 1876 (Sec. 8).

Northern Pacific claimed its due organization and acceptance, but was unable to finance construction of the road by public subscription. By several enactments which preceded the Joint Resolution of 1870, Congress attempted

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[5]Montana was a territory and continued as such until statehood was achieved on November 8, 1889.

[6]*St. Paul and Pacific R. Co. v. Northern Pacific R. Co.*, 139 U. S. 1.

to help Northern Pacific meet the conditions of the Act of 1864; these efforts proved unavailing.[7]

It is historical that the Act of 1864, and subsequent enactments in its enablement, were abortive, and the conditions of the Act were unfulfilled during the period from July 2, 1864, to May 31, 1870. This fact is material to the question of the applicability of the *Proviso* of the Joint Resolution of 1870 to the lands granted to Northern Pacific, including said Section 23.

2. The Terms and Conditions of the Joint Resolution of 1870 Were Accepted by Northern Pacific, the Road Was Constructed With the Proceeds From Its Bonds Secured by Mortgage, and the Right to Section 23 and Other Granted Lands Was Earned.

The sum of the rights afforded by the Joint Resolution of 1870 is an authorization to Northern Pacific to issue bonds secured by mortgage of all of its property in aid of construction; to have as to its main road and branch "the privileges, grants and duties provided for in its act of incorporation"; to be entitled to select lieu lands along the entire road from an additional belt extending ten miles beyond the limits defined in the Act of 1864. All of the foregoing rights are followed by two limiting *Provisos*, the first subjecting all "lands hereby granted" to settlement and pre-emption at a price of not exceeding $2.50 per acre, and the second requiring, in the event of sale under the mortgage, that "the mortgaged lands hereby

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[7] *United States v. Northern Pacific R. Co.*, 311 U. S. 317 at p. 326; and see: Act of May 7, 1866, 14 Stat. at L. 355; Act of July 1, 1868, 15 Stat. at L. 255; Act of March 1, 1869, 15 Stat. at L. 346; Act of April 10, 1869, 16 Stat. at L. 57.

granted" be sold at public sale at places in which situated in single sections or subdivisions thereof to the highest bidder.

Northern Pacific accepted the Joint Resolution of 1870 by creating bonds, secured by mortgage of all of its properties, and constructing the road with the proceeds therefrom. Eastward and westward extensions joined in Montana in 1883, and Northern Pacific Railroad Company, chartered by the Act of 1864, carried on the operation of the line until 1893. The land grant authorized by the Act of 1864 and affirmed as modified by the Joint Resolution of 1870 was earned by the completion of the road. In 1893, Northern Pacific Railroad Company defaulted on its mortgages, and under foreclosure proceedings Northern Pacific Railway Company, Respondent here, acquired title to all of the property of the federally chartered corporation, operated the road, and exercised the statutory rights, privileges and grants. Respondent Northern Pacific Railway Company's continuing obligation under the *Proviso* has been determined.[8]

3. Northern Pacific Selected Section 23 Pursuant to Both the Act of 1864 and the Joint Resolution of 1870 and Patent Thereon Was Issued Expressly Stating That It Was Pursuant to Both Congressional Acts.

On or about September 22, 1900, Northern Pacific filed with the General Land Office of the Department of Interior its Place List No. 36[9] wherein it recited its right by

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[8]Act of June 25, 1929; 46 Stat. at L. 41, Chap. 41; *United States v. Northern Pacific R. Co.*, 311 U. S. 317.

[9]Place List No. 36 was received in evidence and is transmitted to this Court [R. 136].

virtue of the Act and Joint Resolution of 1870 to receive patent to Section 23, in these words:

> "Northern Pacific Railway Company, the successor of the Northern Pacific Railroad Company, under and by virtue of the Acts of Congress, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' approved July 2, 1864, and 'a Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes,' approved May 31, 1870 . . . hereby makes and files the following list of selections of public lands claimed by the said Northern Pacific Railway Company, as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, . . ."

Thereafter, on June 24, 1902, Patent No. 74[10] was issued to Northern Pacific covering Section 23, and other lands, again reciting that the grant was pursuant to the Act of 1864 and the Joint Resolution of 1870 in these words:

> *"To all to whom these presents shall come, Greetings:*
>
> *"Whereas,* by Act of Congress approved July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' and the Joint Resolution of May 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns

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[10]Patent No. 74 was received in evidence and is transmitted to this Court [R. 136].

. . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the Territories of the United States. . . .

"*Now Know Ye* that the United States of America, in consideration of the premises, and pursuant to the said Acts of Congress, *Have Given and Granted,* and by these presents *Do Give* and *Grant* unto the said *Northern Pacific Railway Company,* successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land listed as aforesaid, . . ."

The foregoing language is relevant as evidencing recognition, before any thought of the present controversy, of the effective regrant of the Joint Resolution of 1870 and its source as the origin of title to Section 23, thereby subjecting Section 23 to its *Proviso.*

4. Northern Pacific Contracted to Sell Section 23 to Petitioner's Predecessor, MaBelle Cobb, an Actual Settler, as Required by the Proviso of the Joint Resolution of 1870, but Reserved the Minerals in Derogation Thereof.

On November 30, 1909, Northern Pacific executed its Contract No. 5942[11] with MaBelle Cobb, and provided a stipulation in the Contract according with the Congressional intent expressed in the *Proviso,* in these words:

"As a material part of the consideration of this contract, without which it would not be made, the purchaser agrees that he will within one (1) year from the date hereof break and cultivate at least one-tenth of all of the tillable portion of the premises and

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[11]Contract No. 5942 was received in evidence and is transmitted to this Court [R. 136].

one-tenth per year additional each of the next succeeding two (2) years, or until three-tenths of all tillable land shall have been broken and put under cultivation, and will make proof of such cultivation on or before the 30th day of November in each year, satisfactory to the land commissioner of the vendor."

Contract No. 5942 provided for a purchase price payable to Northern Pacific of $2,880.00 for the 640-acre section, or $4.50 per acre, as against the stipulated maximum of the *Proviso* of $2.50 per acre. In addition, Northern Pacific reserved a part of the fee title, to-wit:

"Excepting and reserving unto the vendor its successors and assigns forever all minerals of any nature whatsoever including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the vendor shall pay to the purchaser the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon. . . ."

Thereafter, and on June 14, 1918, Northern Pacific by deed granted Section 23 to Millard Stubrud, pursuant to its Contract No. 5942 with MaBelle Cobb, to whose right said Stubrud had duly succeeded.[12] The deed to Stubrud contains the mineral reservation above quoted.

Petitioner here succeeded to the title of Stubrud by conveyances of record.[13]

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[12]Deed dated June 14, 1918 was received in evidence herein and is transmitted to this Court [R. 136].

[13]Abstract of Title No. 5381, covering Section 23, was received in evidence and is transmitted to this Court [R. 136].

5. Petitioner's Action Here Under Review Was Timely Commenced, in a Court of Proper Jurisdiction, and Under Appropriate Allegations.

Petitioner, and his predecessors, were continuously in unchallenged and exclusive possession of all of Section 23 until September 3, 1952 [R. 96]. The mineral value of Section 23, and railroad grant lands in its region, were virtually dormant until shortly before that date. Not until the discovery of petroleum deposits of the so-called Williston Basin did controversy arise. The Williston Basin and various petroleum discoveries therein cover extensive areas of Montana, North Dakota and South Dakota; the limits of the productive areas are as yet unknown. Petitioner's Abstract of Title gave no hint of the mineral reservation in the Contract with MaBelle Cobb or in the deed from Northern Pacific to Stubrud; nor was there in the Abstract any intervening instrument or conveyance evidencing other than that the mineral estate was wholly vested in Petitioner. As the exploration of the Williston Basin approached Dawson County and Section 23, and the purported reservation came to light, on May 13, 1952, correspondence opened between Petitioner and Respondents, under which Respondents were apprised of Petitioner's challenge of their rights in the premises [R. 88, 91]. On September 3, 1952, Respondent, The Texas Company, appropriated use of Section 23 in connection with its operations on other lands adjacent thereto [R. 96-97]. On December 8, 1952, Petitioner, as plaintiff, instituted action in the District Court by Complaint, the first cause of action[18a] of which is tantamount to an action to

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[18a]The second and third causes of action allege the wholly wrongful misappropriation of use of Section 23 by The Texas Company for its operations on adjoining lands, and sought injunction thereon, which was granted, and damages, which were awarded to Petitioner.

quiet title and is designed to secure the adjudication of the invalidity of the mineral reservation in the deed from Northern Pacific to Stubrud [R. 3-10, 16].

Jurisdiction of the District Court was invoked under 28 U. S. C. Section 1332. Petitioner alleged his residence in the State of Iowa, that The Texas Company is a Delaware corporation, that Northern Pacific is a Wisconsin corporation, and that the amount in controversy is more than $3,000.00 exclusive of interest and costs [R. 2-4]. These allegations were admitted by Respondents [R. 17-37], and found to be true by the District Court [R. 111-112].

Northern Pacific moved for Summary Judgment [R. 54] and The Texas Company moved for Partial Summary Judgment [R. 52]. These motions resulted in Partial Summary Judgment [R. 66] which was incorporated in the Judgment entered October 13, 1955 [R. 127], adjudicating Northern Pacific the owner in fee of all minerals upon, in or under Section 23, and The Texas Company as possessed of a right to enter thereon as lessee of Northern Pacific [R. 128].

Reasons for Granting the Writ.

1. The Decision of the Court Below Lies Athwart the Congressional Intent That Public Lands and Their Values, Granted Solely in Aid of Railroad Construction, Find Their Ultimate Unencumbered Disposition to the Public at the Stipulated Maximum Return of $2.50 per Acre to Northern Pacific.

What we here say of Section 23 is of equal application to all of those parcels among the forty million acres granted to Northern Pacific which have heretofore been disposed of to settlers by Northern Pacific with little or no service to the *Proviso* of the Joint Resolution of 1870. The issue to be decided is whether the *Proviso* shall be forever entombed as a Congressional expression avowedly in the interest of the general public, but wholly illusory in result.

(a) THE JOINT RESOLUTION OF 1870 WAS IN ITS VERY ESSENCE NECESSARILY A REGRANT, AND AS SUCH, APPLICABLE IN ALL OF ITS TERMS AND PROVISIONS TO ALL OF THE THEN UNEARNED LANDS GRANTED TO NORTHERN PACIFIC UNDER IT AND THE ACT OF 1864.

The Act of 1864 expressly prohibited mortgage or lien of the granted lands; as well, it restrained alienation thereof until patent, which patent was dependent upon adjacent construction of the road and acceptance by the President's Commissioners. See, *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. Only by the Joint Resolution of 1870 did Northern Pacific achieve a full fee to lands adjacent to accepted construction. Prior to the adoption of the Joint Resolution of 1870, the conditions of the Act of 1864 were unfulfilled by Northern Pacific, except as to

such earned lands. It stood, on May 31, 1870, with some indeterminate defeasible interest in unearned lands by virtue of its failure to fulfill the conditions of the Act of 1864, in an estate less than the fee by virtue of its lack of power to encumber. The Joint Resolution of 1870 granted a complete title to the alternate sections, as earned, it affirmed the prior grants of the Act of 1864, and added the power to mortgage unearned lands theretofore wholly lacking from the fee. Unless the Joint Resolution of 1870 is applicable to the entire land grant unearned at the date of its adoption, there is no source of origin of Northern Pacific's title. Northern Pacific thereafter accepted the regrant of the Joint Resolution of 1870, and subjected itself to the limitations of its *Provisos*, on the principle that the burdens follow the benefits accepted. That the Joint Resolution of 1870 was a regrant which was *sine qua non* to the origin of Northern Pacific's title to the granted lands is demonstrated by reasoning which we will summarize.

The financing method originally chosen by Congress is spelled out in the Act of 1864. Construction was to be financed out of public subscription to stock and patent to public lands as each 25 miles of the road was acceptably constructed, without limitation upon resale of lands earned as to settlement or amount of sale price or time of sale. In order to protect the marketability of railroad patented lands, the United States subjected itself to the restriction that it would not sell its reserved alternate sections of public lands at a price of less than $2.50 per acre, and then only to settlers under the "Act to secure homesteads to actual settlers on the public domain" of May 20, 1862. (See Sec. 6 of the Act of July 2, 1864.) Thus, as the road construction progressed, revenue from resale of railroad patented land would be a source of funds in aid of

construction. As determined by this Court, this plan of financing failed.[14]

During the interval between the Act of July 2, 1864, and the Joint Resolution of 1870, the public right to be secure in the eventual ownership of railroad granted lands became of the utmost concern. See *Great Northern R. Co. v. United States*, 315 U. S. 262. This policy in favor of the public, coupled with the circumstance that Northern Pacific failed to perform the conditions of the Act of 1864, renders it well nigh inconceivable that Congress would adopt a *Proviso* requiring disposition to settlers of merely that fraction of the grant adjacent to the newly authorized branch line over the Cascades, and at the same time impose no condition whatsoever on the nearly 2000 miles of main line from Lake Superior to the new terminus at Portland, when both the changed branch line and main line were fully dependent upon the authority and benefits afforded by the Joint Resolution of 1870.

The language of the Joint Resolution of 1870 confirms the conclusion that the *Proviso* is applicable to the entire unearned grant. First, the Joint Resolution authorized the mortgage of *all* of Northern Pacific's property *of all kinds and description*, thereby empowering the mortgage of its entire unearned land grant, and making it plain that the Resolution is applicable to all lands encompassed by both the Act of 1864 and the Joint Resolution of 1870. Next, the Joint Resolution of 1870 reaffirms the authorization to construct the road "under the provisions and with the privileges, grants and duties provided for in its act of incorporation" from the original point, specified

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[14] *United States v. Northern Pacific R. Co.*, 311 U. S. 317 at p. 326.

in the original Act and unspecified in the Joint Resolution, via a changed main line route to Portland, with authority for a branch line to Puget Sound through the Cascade Mountains; thus again, in its reaffirmation of the authority to construct the road, the reference is to the entire line. Next, in the event "in any state or territory" the amount of land granted is not available, an additional "lieu land" belt is defined; the reference to "state or territory" makes it plain that the Joint Resolution of 1870 is embracing the line from beginning to end. Lastly, within the single section, comes the twofold *Proviso:* The first referring to disposition and the second referring to foreclosure sales, and each based upon the words "lands hereby granted." The *Proviso* governs all that has gone before. The words "lands hereby granted" cannot be applied to a small fraction of the entire grant as to eventual disposition to settlers, without being equally applicable to but a small fraction of the entire grant as to foreclosure sales. Yet it has never been contended that the *Proviso* as to foreclosure sales is applicable only to this small fraction of the entire grant, no doubt for the reason that the mortgage authorized by the Joint Resolution of 1870 is clearly applicable to the entire grant. Just as the *Proviso* as to the foreclosure applies to the land grants along the entire line, including the branch, so also its counterpart as to eventual disposition of granted lands remaining unsold or subject to the mortgage, applies to the lands granted along the entire line from beginning to end, and not to the comparatively minor stretch of the branch line across the Cascade Mountains.

Documentary support for this conclusion is found in the instruments under which Northern Pacific made its selection, as well as in the patent signed by President

Theodore Roosevelt. Both Place List No. 36 and Patent No. 74 recite that they are pursuant to the Act of 1864 and the Joint Resolution of 1870. If, in fact, the Joint Resolution of 1870 was not a regrant standing as a part of the origin of title, then it was neither authority for selection nor authority for patent.

The applicability of the *Proviso* to all of the granted lands, and hence to Section 23 here involved, is confirmed by later Congressional expressions. Thus the Joint Congressional Committee acting under the Resolution of June 5, 1924,[18] among its other castigations of the railroad's collusion, fraud and flaunting of the legislative and public will, states as one of its reasons for the forfeiture of Northern Pacific's then outstanding indemnity claims: "(d) the failure of the Northern Pacific Railroad Co. to dispose of any of the granted lands through settlement and pre-emption after July 4, 1884, as required by the resolution of May 31, 1870 . . ."[19] Acting upon the Committee Report, the Congress by its Act of June 25, 1929 expressed its continuing purpose and intention that the policy of the Joint Resolution of 1870 relative to disposition of granted lands should prevail, for which see Appendix B, page 26.

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[18]43 Stat. at L. 461.

[19]The Report of that Committee is found in the Congressional Record of March 2, 1929, 70th Congress, Second Session, Vol. 70, Part 5, pp. 5118 to 5122.

(b) THE PROVISO BEING FULLY APPLICABLE TO ALL GRANTED LANDS, THE MINERAL RESERVATION IN CONFLICT THEREWITH ON SECTION 23 IS VOID.

As noted in the Statement, the statutory time for completion of the road was July 4, 1879, and the road was actually completed in 1883, the Contract with MaBelle Cobb was executed in 1909, and the time intervening was well beyond the five years stipulated in the *Proviso* after which Northern Pacific was required to sell the land for settlement. Contract No. 5942 spelled out the necessity for the grantee to improve the land by the tilling thereof and satisfactorily report thereon to Northern Pacific's Land Commissioner. The price exacted from the settler, MaBelle Cobb, was $4.50, an unlawful consideration in that the Joint Resolution of 1870 prescribed a price of not more than $2.50 per acre. The exaction of mineral reservation was also illegal. The principle is established by *Oregon and California R. Co. v. United States,* 243 U. S. 549, 61 L. Ed. 890, wherein this Court said, at pp. 552 and 553:

> "An immediate and sufficient answer to the contention would seem to be that the grant was not absolute, but was qualified by a condition in favor of settlers, and if the 'lands' granted had such incidents, the 'lands' directed to be sold to actual settlers were intended to have such incidents. That is, if the 'lands' granted carried by necessary implication all that was above the surface and all below the surface, to the railroad company, they carried such implication to the actual settler. In other words, what 'lands' meant to the railroad company they meant to the settler, embraced within his right to purchase and acquire."

An earlier *Oregon and California R. Co.* case, dealing with a similar land grant proviso, is authority for the rule that the grant is law as well as contract, and has the constancy of laws as well as their command, and remains operative and obligatory until repealed. See, *Oregon and California R. Co. v. United States,* 238 U. S. 393.

The foregoing authorities, coupled with the rule that a law relative to a contract becomes a part of the contract[17] constitute the *Proviso* a part of the contract and the deed issued pursuant thereto, as fully as though written therein. The mineral reservation being in conflict with the *Proviso* in the contract and in the deed, and the reservation being against the law, it is void and without legal effect *ab initio.*[18]

In considering the title of Petitioner, as successor to the title of MaBelle Cobb, it is proper to consider that she was peculiarly within the legislative contemplation of the *Proviso* as a consequence of the terms of the contract executed with her by Northern Pacific. She it was who was required to improve the land by tillage for three consecutive years and report annually thereon to the Land Commissioner for Northern Pacific. The successor, Stubrud, received the deed to Section 23 from Northern Pacific, thereby establishing full compliance with the settlement intent of the *Proviso,* and bringing himself squarely within its benefits. As a consequence, we do not have an issue of whether the *Proviso* created a trusteeship, a third party beneficiary contract, or some inchoate interest in favor of the undesignated members of the

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[17]*Valier Company v. State,* 123 Mont. 329, 215 P. 2d 966, Cert. Den. 340 U. S. 827, 71 S. Ct. 63, 95 L. Ed. 607.

[18]*Lowery v. Garfield County,* 122 Mont. 571, 208 P. 2d 478.

general public, which distinguishes this case from the holdings in the *Oregon and California R. Co.* cases, *supra*. But we do concern ourselves with whether the original settlers of the West, the pioneers whose traffic with the railroad was within the contemplation of the Congress as providing its operating revenue, and their successors, shall reap the full measure intended by the Congress, or whether a railroad shall again hold within its private hoard a part of the substance of the land and thereby vitiate the often stated continuing Congressional intention respecting railroad grants.

2. The Opinion of This Court in United States v. Northern Pacific R. Co., Brought Pursuant to Congressional Act, Serves to Support This Petition.

We have included in Appendix B, at page 26, certain of the more pertinent provisions of the Act of June 25, 1929, directing the forfeiture of certain land grants to Northern Pacific, and instructing the Attorney General to file an action to quiet title, for accounting and damages against Northern Pacific, wherein the Congress expressed its continuing intent as to disposition by Northern Pacific in accordance with the policy of the Joint Resolution of 1870. By the Act of May 22, 1936,[19] there was authorized a direct appeal to this Court of the action against Northern Pacific instituted by the Attorney General in accordance with the Act of June 25, 1929 in the District Court for Eastern Washington. The *Proviso* of the Joint Resolution of May 31, 1870 was a major issue.

The Government contended, in its appeal No. 3 before this Court, that the *Proviso* was binding upon Northern

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[19] 49 Stat. at L. 1369, Chap. 444.

Pacific as to every part of the granted lands, that Northern Pacific had breached the policy of the United States prescribed in the *Proviso*, thereby wholly defeating its right to any further award.[20] Northern Pacific moved to dismiss the charge, was sustained by the special master, and the District Court ordered the dismissal. On appeal, this Court reserved its ruling:[21]

> "The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy."

The judgment was reversed:[22]

> "The appeal in No. 4 is without merit, but, upon the appeal in No. 3, the judgment is reversed and the cause is remanded for further proceedings as indicated in this opinion."

In its paragraph 18 of the opinion, this Court passed upon the Government's claim for damages by reason of Northern Pacific's breach of the *Proviso*. The Court specifically held, contrary to the ruling of the District Court, that the Government was entitled to prove any damage to it, or advantage to Northern Pacific, arising out of the breach of the *Proviso*[23] as to additional lands

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[20]*United States v. Northern Pacific R. Co.*, 311 U. S. 317 at p. 338.

[21]311 U. S. 317, at p. 342.

[22]311 U. S. 317, at p. 376.

[23]As an aside, we remark that the holding is judicial determination that Respondents here are bound by the *Proviso* as successors to the federally chartered corporation, the foreclosure proceedings and sale notwithstanding.

granted by the Joint Resolution, but not as to lands *acquired* under the grant of 1864.[24] *United States v. Northern Pacific R. Co.* unquestionably determined that the *Proviso* established a legally enforceable obligation. It unequivocally decided that the obligation applied to all additional lands granted by the Joint Resolution of 1870. The court reserved the question as to whether the *Proviso* applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands; at the same time, the court held that no damages would lie as to lands "acquired" under the Act of 1864, but that damages would lie as to the lands granted under the Joint Resolution of 1870. *These rulings would be inherently contradictory unless the word "acquired" is given its logical meaning, namely, those lands actually earned by adjacent construction accepted by the Government under the terms of the Act of 1864, but prior to and without using the benefits of the Resolution of 1870.* The primary use of the word "acquired" is to gain "usually by one's own exertions." (Webster's New International Dictionary, Second Edition, Unabridged, 1945).

The Court also reserved the question of whether the breach of the conditions of the Act of 1864 by Northern Pacific defeated its entitlement thereunder.[25] Contrary

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[24]311 U. S. at p. 368, wherein this Court said: "We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. We hold further that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands."

[25]311 U. S. at 365, par. 1.

to the conclusions of the lower courts in the judgment to which this Petition is addressed, the Court in *United States v. Northern Pacific R. Co.* did not attempt to delineate the lands which were "acquired" by Northern Pacific under the Act of 1864, or those which were granted under the Joint Resolution of 1870. This was a factual matter, the decision on which was dependent upon the taking of testimony and the cause was remanded for that purpose. *The ultimate decision on this issue rests upon determination of which lands were "acquired" by Northern Pacific as a result of its road construction completed under the Act of 1864 without the benefit of mortgage funds. All land grant acquisitions achieved by construction of the road with mortgage funds find their origin in the additional grant of the Joint Resolution of 1870, which conveyed the power to encumber and with it the financial ability, theretofore lacking, to construct additional road and "acquire" additional land. It is factual that the road was not built in Montana until 1880, that the first mortgage conveying Section 23 was executed on May 1, 1879; thereby Northern Pacific accepted the benefit of the Joint Resolution of 1870 as to said Section 23, and accepted the limitations of the Proviso.*

As we have stated, the *Proviso* applied to all lands subjected to the mortgage authorized by the Joint Resolution, as is evidenced by the use of the words "lands hereby granted" both in the *Proviso* as to disposition, and in the *Proviso* as to mortgage foreclosure sale. The words "or remain subject to the mortgage by this act authorized" in the *Proviso* as to disposition become nugatory in the absence of a construction giving life to the legislative intent that the *Proviso* would apply to all lands regranted by the Joint Resolution with a further quantum

of the fee, to-wit, the power to mortgage, which had been withheld in the Act of 1864. That this Court; in the *United States v. Northern Pacific* case, used the words "additional lands granted by that Resolution" to distinguish from lands *earned and acquired* under the Act of 1864, becomes clear with recognition that no authority was required by Northern Pacific to mortgage lands earned by railroad construction accepted by the President's Commissioners prior to, and without utilizing the benefits of, the Joint Resolution.

The legislative history[20] is consistent with the above construction of the *Proviso*. Thus, a proposed amendment to apply the *Proviso* to all lands "heretofore and hereafter" granted was defeated, as was an amendment to limit the *Proviso* to the "additional alternate sections" granted by the Joint Resolution, the latter being a patent reference to sections adjacent to the new branch line alone.

Even though it should be held that the language of the Court in *United States v. Northern Pacific R. Co.* has the meaning attributed by the courts below in this cause nonetheless the decision would not be controlling in this case. Foremost in support of this conclusion is the Act of June 25, 1929, which has the continuing force of law, and precludes any final determination of the action commanded by Congress against Northern Pacific, except in compliance with its provisions. This case was

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[20]The proceedings in Congress may be found in the following issues of the Congressional Globe: In the Senate: Feb. 8, 1870, p. 1097; Feb. 28, pp. 1584-1586; Mar. 2, pp. 1624-1628; Apr. 7, pp. 2480-2486, 2491-2495; Apr. 9, pp. 2539-2547; Apr. 11, pp. 2569-2584; Apr. 20, pp. 2833-2848; Apr. 21, pp. 2867-2869. In the House: May 5, pp. 3263-3271; May 10, pp. 3343-3348; May 11, pp. 3365-3368; May 25, pp. 3786-3798; May 26, pp. 3850-3853.

compromised, and adjudication as contemplated by Congress was not had, and Judge Schwellenbach so stated.[27] The District Judge's misgivings as to the decree based upon settlement, without Congressional authority, are obvious from his expressions. The consequence of this decree by compromise is the absence of ruling on the facts and contentions which this Court reserved, and Petitioner is not judicially barred by the rule of *stare decisis* from proving those facts which establish the Joint Resolution of 1870 as the origin of title to said Section 23. Most certainly, the harsh deprivation of petitioner's day in Court by summary judgment was unjustified.

Secondly, the Court's opinion in *United States v. Northern Pacific R. Co.* did not deal with oil, gas or minerals of any kind. This action by a place lands grantee of the railroad, a grantee standing in the shoes of a settler chosen by Northern Pacific, who is invoking the continuing Congressional expressions in his favor, and the reserved ruling on the question by this Court, is the only one of its kind. As a prime beneficiary of the *Proviso* Petitioner seeks his right to a full hearing unshackled by an interpretation placed upon a few short sentences arising in the course of litigation between parties differently situated, with a myriad of wholly different issues, and complicated by allegations of fraud, mistake, and administrative mishandling. Again, we respectfully submit, the rule permitting summary judgment has no application where such substantial rights and important factual issues are involved.

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[27] *United States v. Northern Pacific R. Co.*, 41 Fed. Supp. 273, at 280.

Lastly, if it be true that *United States v. Northern Pacific R. Co.* limits the right of the government to damages from Northern Pacific, and no more can be claimed from the language, the public interest in freedom from monopoly of public resources requires that the holding be limited to the parties there before the Court. We respectfully contend that the precise facts and issues in this case have not been decided, and are of such importance as to merit this Court's attention and authoritative final determination. Should the Court construe the language of *United States v. Northern Pacific* as susceptible of the meaning followed by the lower courts, nevertheless the continuing Congressional intent that such lands find their ultimate way into the hands of the public, calls for determination of the precise question here presented, in order that the clearly expressed mandate of Congress to Northern Pacific not be further subverted.

3. The Law of Estoppel in Private Grant, Relied Upon by the Court of Appeal, Is Without Application Where the Origin of Title Is Congressional Act; Neither Does the Law of Estoppel Properly Apply Here, Where Judgment Was Made Summarily.

The Court of Appeal chose to decide this case in principal reliance upon rules of estoppel which, without doubt, govern purely private conveyancing and quiet title actions. It overlooked the laws by which public land, Section 23, came into the possession of Northern Pacific, and in turn, MaBelle Cobb and her successors. In substance and effect Congressional grants of public lands to a railroad, subject to the limitations of a *Proviso* such as here, were a transfer of ownership and administration of the public lands from the government to the railroad in order that the railroad could derive the proceeds

from sale of the lands in aid of construction. Northern Pacific, from May 31, 1870, until five years after completion of the road, had the right to deed the land to whom it would, for such consideration as it would. The reason for the time limitation ceases if, at its expiration, Northern Pacific continued to be free to deal at will. MaBelle Cobb, having paid the price, and settled the land in accordance with the contract stipulations, became the owner of the unencumbered, unreserved title to Section 23, as fully as would have been the case had she been dealing with the Department of Interior. Her full measure of title came by law, which the purported reservation could not destroy. Hence, this is not a case of private grant, but a reliance upon Congressional Act, continually re-expressed, as the origin of a full title which renders the mineral reservation contrary thereto void (see: *Oregon C. R. Co. v. United States,* 238 U. S. 393). The rules of estoppel in private conveyancing have no application to this case.

Furthermore, the very nature of the defense of estoppel would seem to preclude the grant of respondent's motion for summary judgment. The defense of estoppel was respondent's burden to establish. It is equitable in nature, cannot be founded upon a void provision in an instrument,[28] and is conditioned by the "clean hands" maxim. Estoppel is ruled out as a defense by *Oregon v. United States, supra,* in which the Court said, in a railroad grant action,

> "We may observe again that the acts of Congress are laws as well as grants, and have the constancy of laws as well as their command, and are operative

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[28] *Valier Company v. State,* 123 Mont. 329, 215 P. 2d 966, Cert. Den. 340 U. S. 827; 12 Am. Jur. 769.

and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel, and even to the defenses of laches and the statute of limitations."

Estoppel, and the right to invoke it, is of its very essence a fact question, the evidence in rebuttal of which is greatly dependent upon the form in which the estoppel is claimed in the trial court. Under these circumstances, the grant of summary judgment was improper.

Conclusion.

United States v. Union Pacific R. Co.[29] holds that Congress did not intend to deliver the mineral wealth of the country to the railroads by the land grant acts. The case deals with minerals underlying the right-of-way and does not become controlling precedent in this place lands matter; yet the principle upon which it is founded supports the grant of this Petition. The opinion makes plain that the federal policy after the gold strike in California in 1849, was to reserve for public use all known mineral lands. On this Petition, we pose the settler from among the public and their successors, on the one hand, as against Northern Pacific on the other, as the Congressionally intended eventual beneficiary of lands granted where mineral wealth was later discovered. In the *Union Pacific* case it was submitted that public lands were granted that they might be sold by the railroads at maximum marketability in proceeds with which to aid in construction. Also, it was argued that mineral reservations neither afforded maximum return, nor in any other man-

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[29]Decided by this Court on April 8, 1957.

ner aided in building the road, the sole and only purpose for grant of public lands. Furthermore, it was demonstrated that Congress and the nation did not even conceive of the device of severance of the minerals from the fee until thirty years and more after 1870. Had Northern Pacific complied with the terms of the *Proviso* and sold the land within the Congressionally contemplated time after the completion of the road, the settlers would have received the fee unreservedly, simply because the device of reserving mineral rights from the fee was then unknown to Congress or Northern Pacific. These points verify the conclusion that by the *Proviso* of the Joint Resolution of 1870, Congress intended that Northern Pacific convey to settlers the whole fee in order that these lands, unsold during the construction period and five years thereafter, be opened and unreservedly belong to the public, further that this intention found its concept in the belief that the public, succeeding to these public lands and their values, would best accelerate the growth, development and economic health of the country, a concept as valid today as it was in 1870.

For the foregoing reasons, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States Court of Appeals, Ninth Circuit.

Theodore B. Russell, Appellant, v. The Texas Company, a corporation, Frederick T. Manning Drilling Company, a corporation, and The Northern Pacific Railway Company, a corporation, Appellees.

The Texas Company, a corporation, Appellant, v. Theodore B. Russell, Appellee. No. 14983.

Nov. 24, 1956.

Action by surface owner to quiet title to real property and for damages arising from use of surface rights by defendant. The United States District Court for the District of Montana, William D. Murray, J., rendered judgments adverse to surface owner on quiet title cause of action and in favor of surface owner in causes of action based upon damages and the surface owner and one of the defendants appealed. The Court of Appeals, Halbert, District Judge, held that where owner of surface sent to occupier thereof an offer of revocable license to use surface at stated rental per day and recited that continued use of surface would be constituted as an acceptance of offer, and occupier did not cease using premises, it was liable for damages at rate stipulated in offer of revocable license from the day it received the offer.

Judgments affirmed.

Ralph J. Anderson, Stanley P. Sorenson, J. R. Vaughn, Helena, Mont., for appellant.

H. J. Coleman, Cale Crowley, Coleman, Jameson & Lamey, Billings, Mont., Walter Will, Denver, Colo., for appellee and cross appellant, The Texas Co.